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# COMPARATIVE STUDY OF JUDICIAL REVIEW UNDER INDIAN AND AMERICAN CONSTITUTION

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**ABSTRACT**

Judicial review stands as a cornerstone of constitutional democracy; acting as a safeguard for individual rights and ensuring the supremacy of the constitution. This comparative study delves into the intricate mechanisms of judicial review under the Indian and American Constitution, examining their historical evolution, current practices and impact on the legal and political landscape. While both nations have embraced judicial review as a tool to balance power, the application and scope in India and the United States have diverged significantly due to differences in legal traditions, political environments, and constitutional frameworks. Judicial review in the United States was solidified by the landmark case Marbury v. Madison in 1803, whereas in India, it was introduced gradually through judicial interpretation, most notably post the landmark case of Kesavanda Bharti in 1973. This study explores the tension between judicial review and democratic principle in both nations, with a focus on how courts in each system navigate the delicate balance of power between the judiciary, legislature and executive. The central research problem is the extent to which judicial review has evolved to serve as an effective check on governmental overreach without undermining the democratic process. The hypothesis posits that while both systems aim to preserve constitutional integrity, the broader scope of judicial activism in India has led to different outcomes compared to the more restrained approach in the United States. To enhance the efficacy of judicial review while safeguarding democratic values, including the consideration of limits on judicial intervention and enhancing transparency in the judicial process. The research paper analyse the development of judicial review in both constitutional systems, critically compare their current frameworks, and propose reforms that can ensure a balanced and effective judicial review system that upholds the core principles of democracy and constitutionalism.

## 1. Introduction

Judicial review, in its most widely accepted meaning, is the power of courts to consider the constitutionality of acts of other organs of government where the issue of constitutionality is germane to the disposition of law suits properly pending before the courts. The concept of judicial review has different meaning and connotations under different democratic constitution. The constitutional principles of the existence of the power of judicial review ad its need was indicated by chief Justice Marshall in William Marbury v. James Madison. He said: "It is emphatically the province and duty of the judicial department to say what the law is.... ...the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution and not such ordinary act, must govern the case of which they both apply.[1228] Henry J. Abraham defined the concept of judicial review as "the power of any court to hold unconstitutional and unenforceable, any law, any official action based upon a law or any other action by a

[1228] Encyclopedia of the American Constitution 1054 (1986), quoted by V. Nageswara Rao and G.B.Reddy, "Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead," (1997) 39 JILI. 411-423.

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public official that seems to be in conflict with the basic law. Origin of Judicial Review can be traced to U.K. which has no written constitution, it become firmly established in U.S.A. with a written constitution establishing a federal policy.[1229] However; the doctrine reached its culmination under the Indian Constitution where it has been declared to be a basic feature of the constitution. In Minerva Mills Ltd. v. Union Of India.[1230] Bhagwati, J. has observed: It is for the judiciary to uphold the constitutional values and to enforce I the constitutional limitations. That the essence of the rule of law, which inter alia requires that the exercise of powers by government whether it be the legislature or the executive or any other authority, be conditioned by the constitution and the law. The power of judicial review is an integral part of our constitutional system and without it, I there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view if there is one feature of our constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is power of judicial review and it is unquestionably, to my mind, part of the basic structure of the constitution.

**2. Judicial Review: Meaning and Scope**

Judicial review means that revision of a degree or sentence of an inferior court, but these days the concept has under gone great changes and the literal meaning of judicial review is no longer valid. Judicial review is the doctrine in democratic theory under which legislative and executive actions are subject to review, and possible invalidation, by the judiciary. Specific courts with judicial review power must annual the acts of the states when it finds them incompatible with a higher authority, such as the terms of a written constitution. Judicial review is an example of the functioning of separation of powers in a modern governmental system (where the judiciary is one of the three branches of government). This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of governmental norms. As a result, the procedure and scope of judicial review differ from country to country and state to state.

The term judicial review is defined as examination by a country's courts of the actions of the legislative, executive and administrative branches of government to ensure that those actions conform to the provisions of the constitution. Actions that do not conform are unconstitutional and therefore, null and void.[1231]

Judicial review is not an expression exclusively used in constitutional law. Literally, it means the revision of the decree or sentence of an inferior court by a superior court. Under general law, it works through the remedies of appeal, revision and the like, as prescribed by the procedural laws of the land, irrespective of the political system which prevails. Judicial review has, however, a more technical significance in public law, particularly in countries having written constitutions. In such countries it means that courts have the power of testing the validity of the legislative as well as other governmental actions. The necessity of empowering the courts to declare a stature unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the executive on the one hand and the judiciary on the other hand provides the means by which mistakes committed by one are corrected by the other and vice versa. The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of a statute in the light of the policy of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords or conflicts with the

[1229] Henry J. Abraham, Judicial Process, 4th Ed., Oxford University Publication, 1980, p. 296
[1230] Minerva Mills Ltd. v. Union Of India AIR, 1980 SC 1789
[1231] Britannica concise Encyclopaedia, www.answers.com/topic/Judicial_review,

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Constitution and make a declaration accordingly.[1232]

### 3. Historical Background

A) American Constitution

As is the idea of a written constitution, the concept of judicial, review, is a unique American contribution to the art and practice of government.[1233] Under the American federal system, represented by a supreme written constitution, delimiting the jurisdiction of the governmental organ and conferring fundamental rights and liberties on the individuals, Judicial Review became, inevitably and logically, the cornerstone of the entire constitutional schemes, Alexander Hamilton, one of the founding fathers of the American constitution argued that, "the limited constitution can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution, void.[1234]

B) Indian Constitution

Indian constitution represents a systhesis of the ideals of several constitution of the world. The importance of present constitution was well explained by H.C.L. Merrilat as it "shows the combination of a British Parliamentary system where the executive is responsible to the legislature and a written constitution on the American model, including a Bill of Rights and Separation of powers and federal principles by division of powers between centre and federating units, resulting in a unique constitutional position regarding judicial review in India."

Unlike the USA the constitution of India explicitly establishes the doctrine of judicial review in several articles, such as 13,32,131-136, 143,226 and 246. The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the constitution Article 13(2) even goes to the extent of saying that, "The state shall not make any law which takes away or abridges the rights conferred by this part (i.e fundamental rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void. The court in India are thus under a constitutional duty to interpret the constitution and declare the laws as unconstitutional if found to be contrary to any provision of part III of the constitution.

In the absence of judicial review, the written constitution will be reduced to a collection of platitudes without any binding force.3 Accordingly, judicial review has been declared to be a basic feature of the constitution. Khanna, J. has emphasized in Kesavananda Bharti v. State of Kerala that "As long as some fundamental rights exists and are a part of the constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened. Judicial review has thus become an integral part of the constitutional system."[1235] In Minerva Mills Case, Chandrachud, C.J., speaking on behalf of the majority observed: "It is function of the judges, nay their duty, to pronounce upon the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. [1236]

### 4. Judicial Review and Written Constitution

A) Judicial Review and Written constitution in USA

It is sometimes believed that the institution of Judicial Review is predicated upon the existence of a written constitution that is also rigid to some extent. This opinion seems to get its emphatic assertion in the judgment of Marbury v. Madison in which Chief Justice

[1232] Dr. A.S. Anand, "Judicial Review -Judicial Activism - Need for caution", JIL1, Vol. 42 : 2-4, 2000, p. 149
[1233] Martin Shapris and Roeio J. Tresolini, American constitutional law (1979), p. 65
[1234] Alexander Hamitton, The Federalist 78, See also V. Nageswara Rao, Supra Note 23
[1235] Kesavananda Bharti v. State of Kerala (1973) 4 SCC 225
[1236] Supra Note 3

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Marshall uttered: "Certainly all those who have framed written constitution contemplate them has funning the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and it consequently to be considered by the court, as one of the fundamental principles of our society".

As Prof. Corwin puts it, "While the written constitution is nowadays an almost universal feature of popular government, Judicial Review is encountered much less frequently'. Thus, Judicial Review, at least in the sense in which it has developed in the U.S.A., is an implied, not a substantive, power. It is commonly implied, as in the U.S.A., from the Supreme Court's judicial power to interpret law and decide cases. But at the same time, it is to be borne in mind that this power, even in the country of its modem origin and development, is not necessarily related to or derived from the ordinary judicial function of law-enforcement. "That a court called upon to interpret and apply a statute is under no compulsion of logic to ask first whether the statute is valid in terms of some higher constitutional law must, of course, be admitted in view of the fact that the courts in many countries possess no such additional power".[1237]

B) The Framing of the Indian constitution and Judicial Review.

The subject that loomed largest in the minds of assembly members when framing the judicial provisions were the independence of the courts and two closely related issues the powers of the supreme court and Judicial review. The assembly went to great length to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect of the provisions. If the beacon of the judiciary was to remain bright, the courts must be above reproach, free form coercion and from political influence. Under the Government India Act, 1935 the absence of a formal Bill of Rights in the Constitutional document very effectively limited the scope of Judicial Review power to and interpretation of the Act in the light of the division of power between the Centre and the units. Under the present Constitution of India, the horizon of Judicial Review was, in the logic events and things, extended appreciably beyond a 'formal' interpretation of 'federal' provisions, the debates of the Constituent Assembly reveal, beyond any dispute, that the Judiciary was contemplated 'as an extension of the Rights' and an 'arm of the social revolution'.

In the Draft Constitution of India, this power of Judicial review in relation to fundamental rights found formal expression in Art, 8(2) and Art 25(1) and (2) which, when adopted by the nation's, representatives in the Constituent Assembly on November 26, 1949, became the new Art 13(2) and 32(1) and (2), respectively, under the Constitution of India. However, there was a sharp controversy among the members of the Constituent Assembly over the perpetually vexed question of reconciling the conflicting concepts of the individual's fundamental and basic rights and the socio-economic needs of the nation. These needs were concretely expressed in the preamble and the Directive Principles of the State Policy, and even though the Constitution became basically permeated with the philosophy of individualism, an undercurrent, however slow and halting of socialist pattern was clearly discernible.

A compromise had to be struck between the extreme viewpoints of the proponents of the two schools, and Judicial Review, which was recognized as the basic and indispensable precondition for safeguarding the rights and liberties of the individuals, was sought to be tempered by the urge for building up a new society based on the concept of welfare and social righteousness. The consequence was a drastic curtailment of the power of Judicial Review of the Supreme Court of India. The overriding need for 'security of the State' consequent on the partition of India and its aftermath, and the growing fissiparous and

[1237] R.K. Carr, The Supreme Court and Judicial Review, p. 23

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subversive tendencies merely provided further impetus to the process and made it a fait accompli. What happened as a result was that the much debated 'Due Process Clause', which was previously inserted in the original Draft Constitution, became the "first casualty", and was eliminated from the purview of the Right to Personal Liberty and Property. In Art, 21 of the Constitution of India (Art, 15 of the Draft Constitution), it was replaced by 'except according to procedure established by law', and in Art, 31 (1) (Art, 24, el. 1 of the Draft Constitution), it was substituted by 'save by authority of law'. In the Note to Article 15 of the Draft Constitution, the Drafting Committee justified the new insertion as being 'more specific', and referred to Art. XXXI of the Japanese Constitution of 1946. But the real reason lay in the profound feeling of distrust in the Judiciary and an apprehension, based mainly on American experience, that an unbridled power pf judicial policy-making could usher in a series of 'judicial vagaries', offset the governmental balance of power, thwart the cherished ambitions of the framers (of the Constitution) and prevent the representative legislature from fulfilling its mission of assuming the leadership in the task of realisation of the national aspirations. Simultaneously with this 'new awakening', a cluster of provisos was incorporated into the Constitutional document so as to restrict the rights envisaged in Arts. 19, 21 and 31 and reduce the Supreme Court's power of Judicial Review to one of 'formal' review. Lest Judicial Review stood in the way of social and economic progress, the door was kept wide open, through a comparative flexible amending procedure, the impose the ultimate will of the popular representatives in the matter of removing Constitutional limitations.[1238]

**5. Case Laws**

A) Marbury v. Madison

Thomas Jefferson, an Anti-Federalist (or republican) who defeated John Admas, a Federalist, in the presidential election of 1800, was to take office on March 4, 1801, Adamas, the defeated incumbent nominated John Marshall, Adams' secretary of State as fourth Chief Justice of the United States. Marshall assumed office on February 4 but continued to serve as Secretary of State until the end of the Adams administration. During February, the Federalist congress passed (1) the Circuit Act, which inter alia, doubled the number of federal judges and (2) the Organic Act which authorized appointment of 42 justices-of-the-peace's in the District of Columbia Senate confirmation as Adams "Midnight" appointees, virtually all federalists, was completed on March 3. Their commissions were signed by Adams and sealed by Acting Secretary of state Marshall, but due to time pressure, several for the justice of the peace (including that William Marbury) remained undelivered when Jefferson assumed the presidency the next day. Jefferson ordered his new Secretary of State, James Madison, to withhold delivery. Late in 1801, Marbury and several others sought a writ mandamus in the Supreme Court to compel Madison to deliver the commission. The court ordered Madison "to show cause why a mandamus should not issue" and the case was set for argument in the 1802 Term.

The learned chief justice John Marshall founded the doctrine of Judicial Review on the following basic principles:

1 The constitution is the "fundamental and paramount law of the nation" and hence commands supremacy.

2 In the case of written constitution, particularly of federal character, the court has to perform the function of an arbiter in maintaining the balance between the federation and the federating units with regard to distribution of legislative powers.

3 The power of Judicial Review is inherent in a federal constitution though it is not expressly provided for. 4 It is emphatically the province and duty if the Judicial department to say what the law is. The President of U.S.A. and the judges

[1238] 6 Constituent Assembly Debates, Sept. 15, 1949, Vol. IX, p. 1501

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of Supreme Court are under an oath to uphold the constitution.[1239]

B) Judicial Review is the Basic Structure of Constitution

The doctrine of judicial review has been taken to its pinnacle of glory in the famous Kesavananda Bharti v. State of Kerala. In the historic and momentous judgement, the Supreme Court held that while the amending power under article 368 is comprehensive enough to cover the amendment of any part of the constitution including the fundamental rights, the power could not be exercised so as to destroy those features of the Constitution which constitute its basic structure. In Kesvananda Bharti while different judges identified features as constituting the basic structure of the Constitution, it is remarkable that the doctrine of judicial review was not per se mentioned as one of the basic features of the Constitution. In fact, the doctrine of judicial review has been added to the list of basic features in Minerva Mills v. Union of India.

In this case Chandrachud, C.J., speaking for himself and Gupta Untwalia and Kailasm, JJ., has observed that: "Since the Constitution had conferred a limited amending power on the parliament, the parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitation or that power cannot be destroyed.....The donee of limited power cannot by the exercise of that power convert the limited power into an unlimited one."[1240]

Our Constitution is founded on a nice balance of power among the three wings of the State namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws, if courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled.

In the same case Bhagwati, J. has observed: "It is for the judiciary to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the rule of law, which inter alia requires that the exercises of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law. The power of judicial review is an integral part of our Constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution."[1241]

**Conclusion**

In conclusion, the study shows that while both the U.S. and Indian systems of judicial review aim to protect constitutional supremacy and fundamental rights, they differ greatly in scope and approach. In the U.S. judicial review though not expressly written in the constitution has been firmly established since Marbury v. Madison (1803) and is generally applied in a restrained way, mainly to maintain checks and balances and protect individual rights. In India, however, judicial review is explicitly provided in the Constitution (Article 13,32 and 226) and has developed into a more active and interventionist tool. Indian courts not only safeguard rights but also advance broader social and economic goals, even limiting Parliament's power through the" basic Structure doctrine".

[1239] Alfred H. Kelly and Winfred A. Harbison, The American Constitution: It's origin and Development, 1955, p.,288
[1240] www.judicialreview.india.caselaws.in last seen at 20/03/2025
[1241] www.casemine.minarvamills.com last seen at 20/03/2025

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Thus, while the U.S. judiciary focuses on preserving separation of powers, India's judiciary plays a stronger role in shaping policies and governance. India's judiciary has been more interventionist and transformative than its U.S. counterpart.